Supreme Court, U. S.
FILED
SEP 21 1978
MICHAEL RODAK, JR., CLERK

No. 78-134

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES F. SEXTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-134

JAMES F. SEXTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims improperly applied the doctrine of *res judicata* in foreclosing a further challenge to his discharge from federal employment.

This is petitioner's second petition for a writ of certiorari arising out of the same events. The facts are set forth in the opinion of the court of appeals in petitioner's original lawsuit, *Sexton* v. *Kennedy,* 523 F. 2d 1311 (6th Cir. 1975), cert. denied, 425 U.S. 973 (1976).

1. From 1954 to 1966, petitioner was employed as an Internal Revenue Service agent at the IRS office in Cleveland, Ohio. He was separated from the federal service for failure to report to work on reassignment to the IRS office in Dayton, Ohio. After exhausting his administrative appeals, petitioner sought reinstatement and back pay in a lawsuit filed in the United States

District Court for the Northern District of Ohio. Nearly two years later, while the Ohio case was pending, petitioner filed a protective suit for damages in the Court of Claims. The latter action was suspended, pending the outcome of the district court proceeding.

In the district court, petitioner argued that his transfer was a pretext for effecting his discharge because he had criticized his superiors' handling of tax cases and that it therefore denied him the right of free speech. He also argued that the Civil Service Commission's review of his dismissal was inadequate because 46 documents were "missing" from his administrative file. The district court granted summary judgment for the government. The court found "no evidence in the record that [petitioner] was transferred in order to induce his resignation or in order to chill his First Amendment rights" (75-1219 Pet. App. A8). Rather, the court sustained the Commission's conclusion that petitioner's transfer was based on his " 'inability * * * to get along with his supervisors because of an exaggerated idea of his own abilities' " (*id.* at A9). The court found that the allegedly missing documents had been "fully considered by the respective appellate agencies" and were in any event "immaterial to this proceeding" (*id.* at A10). The court of appeals affirmed, and this Court denied certiorari.

In August 1977, petitioner asked the Court of Claims to remove his second case from suspense. The government moved for summary judgment, and the Court of Claims granted the motion (Pet. App. A1-A3). Assuming *arguendo* that it would apply a different standard of review in civil service discharge cases than did the Sixth Circuit, the court held that petitioner's suit nonetheless was barred by the doctrine of *res judicata* (Pet. App. A2). The court explained (Pet. App. A2-A3):

> Plaintiff chose the forum in which to bring his case and his claim and was given consideration plus full judicial review. He cannot now move to another forum, this court, and relitigate his claim simply because he feels this court may be more sympathetic because it has adopted a different standard of review than the forum in which the first proceeding occurred.

2. The decision of the Court of Claims is correct. The merits of petitioner's case were fully addressed in the earlier litigation in the Sixth Circuit; the doctrine of *res judicata* therefore bars further consideration of his claims.

Petitioner contends that the Court of Claims' decision denies him "any judicial review as to the merits and evidential content of the [46] altered and missing documents" (Pet. 7). If by this remark petitioner means that the 46 documents omitted from his administrative file were not before the district court in Ohio, he is wrong. The court of appeals stated (523 F. 2d at 1316):

> Our inspection of this record and of the documents themselves indicates that they were "missing" only in the sense that they were not included in appellant's administrative file. They clearly were before the District Court in its consideration of this case.
>
> Further, we find nothing sinister in their omission from the administrative file. The "missing" documents appear to us to have had little, if anything, to do with the merits of plaintiff's claims. Whether to include them or not was clearly an administrative decision.[1]

---

[1]This case is therefore distinguishable from *Higgins* v. *Kelley*, 574 F. 2d 789 (3d Cir. 1978), on which petitioner relies. *Higgins* involved the discharge of an agent of the Federal Bureau of Investigation. Documents were removed from the agent's personnel folder and

The issue presented in the earlier proceeding, *i.e.*, the propriety of petitioner's discharge, and the record on which that issue was resolved, were precisely the same as the issue and record that petitioner now wishes to present to the Court of Claims.

If, on the other hand, petitioner means that the "missing" documents would have received more thorough consideration from the Court of Claims because that court applies a more stringent standard of review than the Sixth Circuit,[2] his argument is fully answered by the Court of Claims' opinion. Plaintiff chose the forum in which to litigate. He cannot now seek to relitigate in another forum simply because he believes that the second

---

information was excised from the documents that remained. The materials thus withheld from the Civil Service Commission were also withheld from the district court and from the agent himself. Under these circumstances, the court of appeals properly concluded that "the agency's refusal to honor [appellant's] request for production of documents erroneously denied him his procedural rights" (*id.* at 793). Here, by contrast, both petitioner and the district court in Ohio had full access to the 46 "missing" documents. Petitioner has simply been unable to demonstrate how those documents affect the correctness of his discharge.

[2]In his first petition for a writ of certiorari (No. 75-1219), petitioner noted a conflict among the circuits on the issue of the proper scope of judicial review in a civil service discharge proceeding. The government at that time conceded the existence of a disagreement among the courts of appeals, but it argued that petitioner's case was not an appropriate one in which to resolve the conflict because petitioner's discharge was proper whether reviewed under an "arbitrary and capricious" standard or under an arguably more stringent "substantial evidence" standard (75-1219 Mem. in Opp. 5-6). Similarly, even if petitioner were correct in contending that the Court of Claims would conduct a more demanding review of the record than did the district court and the Sixth Circuit, and even if Court of Claims' review were not barred by *res judicata*, petitioner would not be entitled to the relief he seeks.

court would apply a legal standard more favorable to his position. See *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522 (1931); *Chicago Life Insurance Company* v. *Cherry*, 244 U.S. 25 (1917).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1978

DOJ-1978-09